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Supreme Court of the United States

OCTOBER TERM, 1902.

No. 237.

EDWARD H. FARDEE ET AL.,
Plaintiffs in Error,
vs.
A. D. ALDRIDGE ET AL.,
Defendants in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE [illegible] SUPREME JUDICIAL DISTRICT OF TEXAS.

Reply Brief for Plaintiffs in Error.

A. S. LOVETT,
MAXWELL EVARTS,
Counsel for Plaintiffs in Error.

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Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 137.

EDWARD H. PARDEE ET AL.,
Plaintiffs in Error,

vs.

A. D. ALDRIDGE ET AL.,
Defendants in Error.

In Error to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

Pursuant to leave granted upon conclusion of the oral argument, plaintiffs in error come now and reply to some of the points presented in the brief for defendants in error, which for lack of time were not noticed in the oral argument.

Absence of application to State Supreme Court for writ of error.

One of the grounds urged by the defendants in error for the dismissal of the writ of error is that the record does not contain a copy of the application made by plaintiffs in error to the State Supreme Court for writ of error to the Court of Civil Appeals. But, the answer is that such application is no part of the record in the Court of Civil Appeals. The application is in the form of a petition addressed to the Supreme Court. It is filed with the Clerk of the Court of Civil Appeals, whose duty it thereupon becomes to forward the same, together with the record of the Court of Civil Appeals and copies of all the orders of that Court, to the Supreme Court (Rev. Stat. Texas 1895, Art. 942). If error appears, the Supreme Court retains the record and determines the cause finally, rendering therein such judgment as the Court of Civil Appeals should have rendered; and in such case a writ of error from this Court would go to the Supreme Court. But, if no error appears, the Supreme Court refuses the writ, whereupon its clerk returns the record of the Court of Civil Appeals to the clerk

of that Court, but retains as a record of the Supreme Court the petition or application for the writ. Rule 4 of the Supreme Court of Texas reads as follows:

> "Upon refusal by this court of an application for a writ of error, the clerk shall retain the application, together with the transcript and accompanying papers, for fifteen days from the day of the rendition of the judgment refusing the writ. At the end of which time, if no motion for a rehearing has been filed, * * * he shall transmit to the clerk of the court of civil appeals to which the writ of error was sought to be sued out, a certified copy of the orders of this court denying such application, and overruling the motion for rehearing, in case such motion has been filed; and shall return the file papers of that court to the clerk thereof, *but shall not return the petition for the writ of error*," *etc.*

Obviously, therefore, the petition for writ of error is no part of the record of the Court of Civil Appeals.

We had supposed that further controversy respecting this matter was precluded by the decision of this Court in *Bacon* v. *Texas*, 163

U. S., 207, where it was definitely determined that writs of error from this Court based upon the denial of a federal right should be addressed to the Court of Civil Appeals and not to the Supreme Court of Texas in cases where the latter court refused to take jurisdiction of and review the case. A reference to the original record in this Court of the case of *Bacon* v. *Texas* will show that it did not contain a copy of the application to the Supreme Court of Texas for a writ of error.

The certified copy of the order of the Supreme Court of Texas refusing the writ of error which the Clerk of that Court is required to send to the Clerk of the Court of Civil Appeals, properly becomes a part of the record of the latter Court, and such order will be found in the record of the case at bar, page 227. This appearing, we submit that the record is complete and shows that the State Supreme Court refused to review the rulings of the Court of Civil Appeals. The proceedings of the Court of Civil Appeals is the only matter before the Court, and it should be presumed, as a matter of course, that our application to the State Supreme Court sought a review of all the errors committed by the Court

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of Civil Appeals (as it did in fact) and of which complaint is still made.

EXCEPTIONS TO THE CHARGE.

Another ground of the motion to dismiss the writ of error is that plaintiffs in error failed to reserve a bill of exceptions to the action of the trial court in refusing special charges 8, 9, 10, 11 and 12 (Record 34–37). A complete answer to this would seem to be afforded by Article 1,320 of the Revised Statutes of Texas, 1895, which reads as follows:

> "When the instructions asked, or some of them, are refused, * * * such instructions shall be filed with the clerk, and shall constitute a part of the record of the cause, subject to revision for error without the necessity of taking any bill of exceptions thereto."

It seems to be argued however that, notwithstanding such statute, this Court is without power to consider the federal question unless the point shall be presented by exception taken in the manner prescribed by procedure in the Federal Courts of original jurisdiction. The result of the contention is that if a litigant in a State Court

has a federal right involved, he must, in order to preserve it for review by this Court, observe on the trial the mode of procedure obtaining in the Federal Circuit Courts rather than the procedure of the Court in which the trial takes place, no matter how inconsistent such modes may be. Of course such is not the law. If the trial of this case had occurred in a Federal Circuit Court, objection to the consideration of the ruling in refusing the special charges would be well taken because no exceptions to such ruling were reserved as required by the practice of such Courts. But on a writ of error from this Court to a State Court under Section 709, U. S. R. S., this Court takes the record as it is made in the State Court and considers any ruling involving a federal right that is complained of within the time and is preserved in the manner required by the State statutes or rules governing the practice of the State Court. The reason for and necessity of this are obvious.

In the same connection defendants in error also dwell upon that provision of Section 709, U. S. R. S. to the effect that the writ from this Court "shall have the same effect as if the judgment or decree complained of had been rendered

or passed in a court of the United States." This, of course, only means that the efficacy of the writ shall be the same; and has to do only with the transmission of the record to this Court, and not with the forms or modes of procedure respecting matters occurring on the trial or at any time before the allowance of the writ from this Court.

ALLEGED ABANDONMENT OF FEDERAL RIGHT.

In subdivision "C" of defendant's brief (pages 24–31) it seems to be argued in support of the motions to dismiss the writ of error that because the case was submitted to the jury on special issues, and because plaintiffs in error did not in some different and unnamed form complain of the action of the Court in submitting special issues, and did not move to set aside the verdict of the jury, they lost the benefit of their contention that the foreclosure decrees of the Federal Court embraced the Hughes & Slaughter tract and the Mayes tract. There seem to be several conclusive answers to this argument.

(1) The most obvious one is that as the facts found by the jury in reference to the two tracts named in obedience to the instructions of the

Court (Record, pp. 41–42), were sufficient to show that said two tracts were covered by the foreclosure decrees, and that as the District Judge took the same view and rendered judgment in their favor for both of said tracts (Record, pp. 47–48), the plaintiffs in error had no occasion to complain of the verdict, or to move to set it aside, or to move for a new trial, so far as those two tracts were concerned. They did move for a new trial as to the rest of the land (Record, pp. 58–60), but that is immaterial, since we are not complaining now of the judgment of the State Court in that respect; and we agree that only the Hughes & Slaughter tract and the Mayes tract are involved now.

(2) It may be true that whether the issues of fact arising in a case shall be submitted to the jury on special issues or under instructions to return a general verdict is a matter resting in the discretion of the trial judge. But that consideration is not material here, since there were no *issues of fact* to be submitted to a jury in any form, because the evidence is entirely free from conflict. It is a well-settled rule of law in Texas, as we presume it is everywhere, that the trial judge is not authorized to submit to the jury by

special issues or otherwise any question not made by the evidence in the case; and that where the evidence is free from conflict, it is the duty of the judge to decide the case thus made according to law without reference to a jury. The foreclosure decrees of the Federal Court were in evidence and the facts respecting the use of the two tracts of land in controversy and the purpose for which they had been acquired being without any conflict, the plaintiffs in error, upon the conclusion of the evidence, requested the peremptory instructions embraced in special charges 8, 9, 10, 11 and 12 (Record, pp. 34–36). This was certainly sufficient to present their contention and to preserve their rights, and if the decrees did embrace the property such charges should have been given. It was wholly immaterial, so far as the federal rights of plaintiffs in error were concerned, that the trial judge concluded to submit special issues to the jury when such rights had been asserted by them in due form and time. If complaint at the action of the court submitting the case upon special issues be necessary, as seems to be contended by counsel for the defendants in error, then we ask what other complaint could be required or expected

than a request in due form to instruct the jury peremptorily to return a verdict, because of certain uncontroverted facts? But, as already stated, we really had no occasion to complain of the action of the court in submitting special issues so far as the Hughes & Slaughter tract and the Mayes tract are concerned, when he instructed the jury peremptorily to find certain undisputed facts, which entitled the plaintiffs in error to both of those tracts, as the trial judge himself held, when he came to enter judgment.

ONLY THE HUGHES & SLAUGHTER TRACT AND THE MAYES TRACT NOW INVOLVED.

In subdivision "E" of their brief (pp. 31–35), the defendants in error in support of their motion to dismiss the writ of error, contend that the plaintiffs in error have abandoned their complaint of the judgment of the District Court, with respect to what the defendants in error designate as the "bonus lands." That is correct; such lands have never been used and are so situated that they are not capable of use in connection with the operation of the railroad, and of course were not acquired for such use. If the action of the defendants in error in the State Court had

been limited to such lands, this controversy would have terminated long ago. We defended as to them, however, not so much upon the strength of our own title as because of what we deemed the insufficiency of the title of the defendants in error who being plaintiffs in the State Court were required to recover, if at all, upon the strength of their own title. It was held sufficient, however, by the State Courts, and, that being a question of local law, we have not brought it to this Court. But as to the Hughes & Slaughter tract and the Mayes tract we contend, and have contended throughout the proceeding, that they were embraced by the foreclosure decrees of the Federal Court through which we claim, and that such decrees were effectual to deprive the Texas Trunk Railroad Company, under which the defendants in error also claim, of all title and to vest the same in us.

THE FEDERAL RIGHTS WERE ASSERTED IN DUE TIME AND FORM AND WERE PRESERVED THROUGHOUT THE PROCEEDINGS IN THE STATE COURTS.

The statutes of Texas governing the action of trespass to try titles provide that a defendant in

the action may file only the plea of "not guilty;" and Article 5,257, R. S. Tex. 1895, reads as follows:

> "Under such plea of 'not guilty' the defendant may give in evidence any lawful defense to the action, except the defense of limitation which shall be specially pleaded."

And it has been held, that, if nevertheless a defendant should specially plead any defense other than that of limitation, he is limited to the defense thus specially pleaded. Consequently the answer of the defendants in the case at bar was limited to pleas of limitation and of "not guilty" (Record, pp. 7–10). It was deemed safer to assert the federal rights relied upon during the progress of the trial rather than limit the effect of the plea of "not guilty" by specially pleading it in the answer (*Chicago, &c., R. Co.* v. *Chicago*, 166 U. S., 226, 231). When the foreclosure decrees of the Federal Court (Record, pp. 152–165) were offered in evidence upon the trial in the District Court, the plaintiffs in error "in connection with the offer of said testimony" stated that their "contention was that the effect of said proceedings was to pass the title to the property involved in

this suit to the purchasers at said sale and that to give due effect to said foreclosure and sale and confirmation, it is required that the Court should hold that the property involved in this suit passed to the purchasers at such sale" (Record, pp. 151–152).

Then, upon the conclusion of the evidence and in due form and time, the plaintiffs in error again specially set up and asserted the federal right by special charges 8, 9, 10, 11 and 12 requested by them and set forth in the record, pages 34–37. Under the Texas practice, if a special charge is broader than it should be, its refusal is not error, although it may be correct in some part. Special charges 8 and 9 were intended to apply to all the land in controversy, including the Hughes & Slaughter tract and the Mayes tract. But in view of the rule of practice just stated, it was deemed safer to request special charges 10 and 11 applying only to those two tracts. The refusal of such special charges was made the basis of the 10th, 11th, 20th, 21st and 22d assignments of error to the Court of Civil Appeals. The Court refused to sustain the assignments; and the record shows that application was made to the State Supreme Court for a

writ of error and was denied (Record, p. 227), and while the record does not contain a copy of the petition to that Court for a writ of error, since such petition is a record of the Supreme Court and not of the Court of Civil Appeals, yet, if it is necessary to indulge presumptions at all, it should be presumed that the application to the State Supreme Court was based upon the errors assigned in the Court of Civil Appeals.

POWER OF THIS COURT TO EXAMINE THE FACTS.

It is urged in the briefs of Defendants in Error, and was strenuously argued by their counsel at the bar, that this Court is without power to review the judgment of the Court below, because it involves consideration of the facts. And yet it is not claimed that there is any conflict in the evidence, but on the contrary, it was admitted at the bar that the evidence is entirely free from conflict. Counsel on both sides agree in this view of the evidence. The evidence has been brought up in the record in conformity with the Texas practice, in what is denominated in that State as the "Statement of Facts," and is obviously free from conflict. Now we endeavored to show in our original brief filed in this Court

(pages 29–58) that in such circumstances this Court clearly and of necessity has the power to examine the facts, and determine whether or not, in view of them, the judgment of the State Court has denied to the foreclosure decrees of the Federal Court the effect to which they are by law entitled; and we need not reiterate what is there stated.

But counsel for defendants in error have much to say about "ultimate facts" and "evidential facts," and contend that this Court can consider only the "ultimate facts" as found by the jury and by the Court below. The only definition of these phrases as used by opposing counsel seems to be that such findings or facts as appear to be in favor of defendants in error are "ultimate facts," while such as are in favor of plaintiffs in error are only "evidential facts."

But the distinction between "ultimate facts" and "evidential facts" is academic so far as this case is concerned. The question before the Court is whether the decrees in the Federal Court in the foreclosure proceedings embraced the two tracts in controversy. The decrees speak for themselves, of course, and the *facts* respecting the occupation of the property by the main tracks of

the railroad and its use for other railroad purposes and respecting the intention of the company in acquiring the property are without dispute. Such facts are, we submit, the "ultimate facts" in the case if it be deemed necessary to particularly characterize them, and are indisputably established by the evidence and by the verdict of the jury which we shall next proceed to consider.

The verdict.

Counsel for the defendants in error in his brief and argument has ignored so much of the verdict of the jury relating to the two tracts in controversy as was returned in obedience to the instructions of the Court (Record, 18–19) and proceeds as though the findings in response to the special issues framed by counsel for defendants in error (plaintiffs below) were the only findings in the case. Such assumption is of course unwarranted. We submit that the findings returned in response to the instructions of the Court covered all the material or "ultimate" facts in the case. Finding (2) (Record, 18) with reference to the Hughes & Slaughter tract was (1) that when that tract was bought "it was

the purpose and intention of the railroad company and its officers to construct on it the main track of said railroad, part of the sheds of the railroad and whatever switches and side tracks should be necessary in the operation of the road," (2) that if all of it should not be needed then the rest should be sold to the employes of the Company, (3) that no such sales had ever been made nor had any part of the land been subdivided into lots, (4) that the main track of the railroad had been constructed across the land near its western boundary, (5) that side tracks were constructed upon the land and a "Y" was constructed near the center of it and extending eastwardly across the land, (6) that a ticket office and car shed was constructed upon the land, (7) that such improvements were used in the operation of the road up to 1892, (8) that the company never owned any other land in the city of Dallas which was the terminus of its line, (9) that as originally contemplated and as actually constructed the road, if properly operated, would need as much as twenty-five acres for terminal facilities, etc.

All these findings were established by the undisputed evidence in the case, and while the Judge finally consented to submit the case on special

issues as urged by counsel for defendants in error, yet with reference to these uncontroverted facts, he directed the jury what their findings should be. We submit that the facts show beyond controversy that the property was covered by the mortgage which counsel for defendants in error concede embraced (1) property actually *used* for railroad purposes *or* (2) property *intended* for railroad purposes. Substantially the same facts were found in finding 3 (Record 19) with reference to the Mayes tract, except that the Judge did of his own motion submit to the jury with reference to that particular tract questions 3*a* and 3*b*, as to whether the property was really "necessary" to the operation of the road. But that is not material, since if it were *actually used*, or if it were *intended*, for railroad purposes, it is sufficient to bring it within the mortgage whether absolutely "necessary" or not.

It is such findings as the above, based upon the undisputed evidence and having the sanction of the trial Judge which counsel for defendants in error are pleased to term "evidential facts." He does not, as we understand, dispute their truth, but ignores them as immaterial, though he does indeed, considering and discussing other

findings of the jury upon his own issues, assume positions inconsistent with these facts.

Let us proceed now to consider, but in the briefest possible manner, the findings of the jury upon the special issues prepared by, and submitted at the request of, counsel for defendants in error.

The fourth and fifth (Record 19 and 20) to the effect that *all* of the Hughes and Slaughter tract was purchased by the Railroad Company for the purpose of subdividing the same into lots and selling the same to employes of the company, are not only inconsistent with finding (2) directed by the Court, but are absolutely contrary to the only evidence in the case upon that point. The only evidence outside of the circumstances of its use showing the intention of the company in purchasing the property, was that of W. L. Cabell (Record 131–132) who testified positively that it was bought for railroad purposes but that if all should not be *needed* for such purposes the surplus should be divided into lots, etc., though "*all that was necessary for tracks and switches was to be used for that purpose;*" and the evidence W. H. Gaston (138–139). The testimony of plaintiff's witness Johnson

(127–128) as well as of the witness Whyte (141–142) which was uncontroverted, showed that all of the tract was indeed "*needed*" for railroad purposes.

The sixth finding (Record, 20) to the effect that no part of the tract was used by the company in the operation of its road at the date of the execution of the International Trust Company mortgage is probably true, since that mortgage was dated March 22, 1880, while the deed to the property was not executed until March 13, nine days before, and was not delivered until September following. Obviously such issue is immaterial.

It will be observed that special issues seventh and eighth were ingeniously framed so as to ask whether the "Y" existed, upon the very days when the mortgages were respectively executed; and the jury answered the question literally. It is of course wholly immaterial whether the "Y" actually existed upon the *very day* of the execution of either of the mortgages. It is quite likely that it did not exist on March 22, 1880, when the International Trust Company mortgage was executed, since the deed conveying the property to the company was executed but nine days before.

But it is perfectly clear from the record that the Y did exist and was actually used in the operation of the road up to March, 1892, when it was removed by William Whyte, then superintendent for Receiver Atkins, appointed in the proceedings for the foreclosure of the Central Trust Company mortgage. Whyte became connected with the property upon appointment of that receiver in September, 1891, and testified as follows (Record, folio 141–142):

> "When I first became connected with the road there was a small depot on the 25-acre tract, I think 12 by 14, not now in existence. There was a sand house for drying sand and a blacksmith shop and an oil and waste house and some small temporary buildings. I don't remember now the extent of them; we used these improvements at that time. That is all I had to do with when I started. *We used that land as our terminal up to February, 1892*, when we connected with the H. & T. C. * * * * My recollection is that there was a complete Y on the property when I took charge. A Y has two curves and a stem. I cannot well locate on the map the other leg of the Y because the leg of the Y on the map is

not located to suit; it was farther south. The stem of the Y was 75 or 100 feet long, as well as I recollect. Both prongs of the Y connected with the main track of the Texas Trunk. I guess that the stem of the Y terminated about 150 feet from the northeast boundary of the 25 acres. *I took that Y up. I used it about four months before it was taken up. I think I took it up in March, 1892, after I commenced running to the H. & T. C. terminals.*"

The ninth special finding (Record, 21) is obviously immaterial, since the lien of the mortgage attached, if at all, upon its execution in 1888.

The tenth special issue (Record, 21) is not only contrary to special finding 2 (Record, 18), but is plainly contrary to the uncontroverted facts which are that the main track of the railroad at least has always been and is still upon the twenty-five-acre tract, and that it was extensively used and occupied in other ways in connection with the operation of the railroad.

Findings 11th, 12th, 13th and 14th are plainly in conflict with finding 2 (Record, 18), and also with the uncontroverted evidence in the case; and they never should have been submitted.

Not only the physical facts shown by the construction of the main track across the property, as appears from the map (Record, 124), but also the testimony of defendants' in error own witnesses show such findings to be untrue. The testimony is quoted and discussed in our original brief, pages 62–68.

The answers to the 16th and 17th special issues (Record, 22–23) are the same in effect as the answers to the 7th and 8th, which we have just discussed.

The answer to the 18th shows that the stem of the "Y" approached to within 275 feet of the northeasterly boundary of the tract, which is 125 feet further from the boundary than it was placed by the witnesses Johnson and Whyte who alone testified on the subject. By reference to the map (Record, 124), it seems likely that the jury answered this question by approximating the space between the northeasterly boundary and the arm of the "Y" shown upon the map, which was obviously incorrect since it ignores the stem that at one time existed, but which is not shown on the map.

The 19th finding is to the effect that when the Hughes and Slaughter tract was acquired it

was the intention also to acquire and use the "flat iron" tract—a proposition which it is unnecessary for us to controvert, though as a matter of fact the "flat iron" tract was never acquired in any form; and its purchase as a *substitute* for the Hughes & Slaughter tract was never even contemplated, but it was desired as *additional* terminal grounds and really to fill out the former tract.

We therefore submit that practically all the special issues prepared by and submitted at the request of counsel for defendants in error are immaterial, and that if there be any "evidential findings" in the record, they are presented by the special issues prepared by defendants in error's counsel, and not by special findings (2) and (3) returned in response to the Court's instructions. Such of the findings upon which the defendants in error rely as are not immaterial are not only inconsistent with the findings (2) and (3) directed by the Court, but are also palpably contrary to the undisputed evidence.

But counsel for defendants in error devote much space in their brief (pp. 24–31) and in their supplemental brief and also gave much time in the oral argument, to the proposition that under the

Texas statute, the verdict of a jury is conclusive upon the facts found; and also that this is true whether the verdict is unsupported by the evidence or not. This proposition needs to be divided. The verdict is undoubtedly "conclusive as to the facts found," and it is so provided by Article 1332 of the Texas statutes, but this is true only when the evidence is conflicting, and there is thus presented an *issue of fact* to be determined by the jury. It was never contemplated by the statute that a special *issue* would be submitted to a jury when there was no evidence presenting any such *issue* or to support it if found as a fact. It is settled by repeated decisions of the Supreme Court of Texas that it is reversible error for a trial judge to submit to the jury an issue not called for by the evidence.

As to the other division of the proposition to the effect that the finding is conclusive although without support in the evidence, we dissent absolutely. It is no more the law in Texas than in any other civilized community that a jury verdict against the uncontroverted evidence is binding upon any one. All the Supreme Court of Texas decided in *Ablowich v. Bank*, 67 *S. W. Reptr.* 79, and *Waller v. Liles*, 70 *S. W. Reptr.* 17, was,

that after a trial judge submits a case to a jury, he cannot then, when the verdict returned does not meet his approval, ignore the verdict and proceed to render judgment in conflict therewith. It is his duty in such case to set the verdict aside and try the case again. Where, however, the case is submitted on special issues, if the answers returned by the jury embrace the material facts, the Court certainly is not precluded from rendering judgment consistent with such facts, regardless of any findings upon any mere immaterial issues that do not control.

Here we submit the material facts were found in findings 2 and 3 (Record, pp. 18–19), and being also established by the uncontroverted evidence, it was the duty of the Court to render judgment accordingly without regard to the irrelevant and immaterial issues prepared by and submitted at the request of counsel for the Defendants in Error.

But the most that can be claimed by the defendants in error with any reason at all, for the findings upon the special issues prepared by their counsel is, that they are inconsistent with the findings returned in response to the directions of the Court. In that view, the case presents con-

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tradictory findings by the jury. Then what? Are the plaintiffs in error to be deprived of their Federal rights by the irregular proceeding adopted and followed by the State Courts. They strictly conformed to the requirements of the State Court practice in asserting their rights. We have seen that they claimed the protection of the Federal Court decrees when such decrees were offered in evidence; and in due form and time they requested suitable instructions of the trial Court, which, if given, would have resulted in a verdict and judgment in their favor, based upon the efficacy of the Federal Court foreclosure decrees. They could not prevent the State Court from submitting special and inconsistent issues to the jury. They had exhausted their remedy in the trial Court and they carried the points in due form to the Court of Civil Appeals. That Court did not see proper to remand the case for a new trial on account of the conflicting issues, if there be any conflict, but proceeded to ignore, practically, findings 2 and 3 and to reverse the District Court and render judgment for defendants in error, thus apparently taking the view urged by counsel for the defendants in error, that the material and "ultimate" facts

found in findings (2) and (3) were merely and only "evidential facts." It is not seriously claimed that plaintiffs in error were in any wise derelict. There is certainly no reasonable room for any such claim.

Since the Court of Civil Appeals deemed the verdict sufficient, to admit of a judgment without remanding the case on account of any conflicting findings, we submit that it is too late for the defendants in error to put forward any such claim in this Court. Indeed they do not exactly contend that the findings are inconsistent, but in their printed and oral arguments dispose of findings (2) and (3) by terming them at one time merely "evidential facts," and at another as "surplusage." Just why those findings should be of any less dignity than the others, or just why they are to be superseded by other findings in case of conflict, we are left to wonder. There does not seem to be any real or serious dispute that the facts covered by them are more material and more controlling in the decision of the case than those embraced in any of the other findings. The circumstance, too, that they were framed and submitted by the trial judge of his own motion, and as embodying what he

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conceived to be the material issues established by the uncontroverted evidence would seem to entitle such findings to as much rank and dignity as the findings returned in response to the special issues prepared by counsel for the Defendants in Error.

But more important still, findings (2) and (3) are based upon the uncontroverted and indisputable evidence. This is not really disputed, but is rather evaded by the defendants in error. Now in case of conflict in the findings of a jury, if there is deemed to be any conflict in this case, ought not the findings based upon the uncontroverted evidence and supported by the approval also of the trial judge be adopted by this Court rather than the findings which are clearly and unmistakably opposed to and without support whatever in the evidence?

In other words, which is to prevail in case of a conflict—the findings supported by the undisputed evidence in the case, or the findings which are not only without, but are directly opposed to the evidence?

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